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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HERBERT M. COLLINS, *et al.*,
Petitioners,

v.

CITY OF NORFOLK, VIRGINIA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

This is an action challenging at-large city council elections in Norfolk, Virginia, for unlawful dilution of black voting strength in violation of Section 2 of the Voting Rights Act. The District Court, using its own standards for the legal criteria which departed significantly from those mandated by Congress for proving a Section 2 violation, ruled that the proof failed to establish a violation of Section 2. The Court of Appeals, Judge Butzner dissenting, viewed all of the district court's decision as resting entirely upon factual findings subject to the "clearly erroneous" standard of Fed. R. Civ. P. Rule 52(a) and it affirmed the district court's judgment without examining the legal framework by which the trial judge evaluated the facts. In this context, the questions presented are:

1. Whether the Court of Appeals met its responsibility to correct the errors of law that infected both the subsidiary fact-finding and the ultimate judgment of the district court, when it applied the "clearly erroneous" standard of review to all of the issues raised in this case, including challenges to the district court's interpretation of terms and standards in Section 2 of the Voting Rights Act and its legislative history?

2. Whether relief under Section 2 of the Voting Rights Act, as amended in 1982, may be denied because of a district court's view that actions and conditions which Congress stated were highly indicative of a statutory violation had not been brought about "intentionally," when Congress' clear purpose in amending the law was to eliminate any "intent" requirement from Section 2 cases?

3. Whether the Court of Appeals should have reversed as "clearly erroneous" the district court's assertion that there was "no evidence" to support plaintiffs' claim of an attempt to moot this voting discrimination lawsuit by manipulating the election of an additional black city

council member on the eve of trial, since the evidence included highly probative indicia of this claim, including admissions by an important governmental official of probative contemporaneous statements?

4. Whether the Court of Appeals erred in affirming the District Court's judgment denying relief from at-large city council voting based, in part, on the District Court's view that the institution of a ward system in which some wards would be majority black would constitute "segregated voting" and would violate Section 2's proviso that the statute does not establish a right to proportional representation.

LIST OF PARTIES

The Petitioners, plaintiffs in the action below, are: Herbert M. Collins, Dr. Marks S. Richard, Barbara C. Parham, William E. Swindell, Jr., Dr. Milton A. Reid, Julien Hazel, George Banks, and the Norfolk Branch, National Association for the Advancement of Colored People. The Respondents, defendants in the action below, are the City of Norfolk, Virginia; Vincent J. Thomas, Mayor; Dr. Mason C. Andrews, Joseph A. Leafe, Rev. Joseph N. Green, Jr., Claude J. Staylor, Jr., Robert E. Summers, and Mrs. Elizabeth M. Howell, members of the Norfolk City Council; the City of Norfolk Electoral Board; and Paul D. Fraim, Martha H. Boone and Paul M. Lipkin, members of the City of Norfolk Electoral Board. Respondents were sued in their official capicity and are designated according to office held when suit was filed.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, who are the Norfolk Branch of the NAACP and seven black voters in Norfolk, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on July 22, 1985.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are reported at 768 F.2d 572 and are reprinted at App. A. The opinion of the district court is reported at 605 F. Supp. 377 and is reprinted at App. B.

STATEMENT OF RELATED PROCEEDINGS

The principal issues of substantive law in this petition overlap with those presently before this Court in *Thornburg v. Gingles*, No. 83-1968 (October Term, 1985), in which oral argument was held on December 4, 1985. Petitioners respectfully request this Court to defer consideration of the present petition pending the resolution of *Thornburg v. Gingles*.

JURISDICTION

The Court below entered judgment on July 22, 1985, App. E, 83a. On September 13, 1985, the Court of Appeals denied a timely petition for rehearing, App. D, 82a. On November 25, 1985, Chief Justice Burger extended the time for filing this petition to and including January 31, 1986, App. C, 81a. This Court has jurisdiction to review the judgment below under 28 U.S.C. § 1254(1).

STATUTES AND RULE INVOLVED

The pertinent parts of Section 2 of the Voting Rights Act, as amended, 42 U.S.C. § 1973, and of Rule 52(a), Fed.R.Civ. Pro., are reprinted at Apps. G and H.

STATEMENT OF THE CASE

Norfolk selects its seven-member city council in city-wide, at-large elections for staggered four-year terms. Generally, three council members are elected one year and four council members are elected two years later. (App. 27a.)[1] Norfolk is Virginia's sixth largest city in size, and with a population of 266,979 (1980 Census) is Virginia's largest city in population. As of 1980, blacks made up 35.2 percent of the general population and 31.48 percent of the voting age population (App. 26a). At the time of 1984 municipal elections, an estimated 35.4 percent of Norfolk's registered voters were black (Ex. P-213).

Sixty-five percent of the black citizens of Norfolk are concentrated in 15 of the 55 precincts in Norfolk (Ex. P-158). Of these 15 precincts, 11 are over 90 percent black (Tr. 599). If Norfolk were divided into single-

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[1] "App." refers to the appendix to this petition, "Tr." refers to pages in the trial transcript, "Ex. P-" refers to plaintiffs' exhibits, and "Ex. D-" to defendants' exhibits admitted into evidence at trial.

member districts or wards, blacks would have voting majorities in three of the seven wards (Tr. 670, Ex. P-52).

Despite the fact that Norfolk historically has been approximately one-third black or more, in the half-century between 1918 (when at-large voting was adopted) and 1968, no black person ever was elected to that body (App. 27a). The first black councilman was elected in 1968 but from then until the time this lawsuit was filed, the council never had more than one black member (*id.*). In the May, 1984 city council election, held after this lawsuit was filed and just three weeks before trial, for the first time a second black council member was elected (*id.*).

At trial, plaintiffs presented extensive evidence to establish the existence of each of the factors which Congress, when it enacted the 1982 Amendments to Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, declared would support a finding of lack of full access to the political process for minority citizens, in violation of the Act. *See* S. Rep. No. 97-417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 206-07 [hereinafter cited as S.Rep.].[2] We summarize below some of the evidence on matters which are significant because of the district court's legal errors.

To demonstrate racially polarized voting in Norfolk, plaintiffs established that from 1974 to 1982 the proportion of white votes for all white city council candidates ranged from 89.7 percent to 99.1 percent (Tr. 618-19, Ex. P-179). Votes by whites for all black candidates ranged from 0.9 percent to a high of only 10.3 percent (*id.*). No black candidate for city council has ever been supported by more than 32 percent of white voters. (Tr. 633, Ex. P-183). While black voters have at times backed

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[2] These factors are listed in Judge Murnaghan's majority opinion for the Court of Appeals. App. 7a-8a.

certain white candidates, in the last two elections blacks have overwhelmingly voted for black candidates (67.0 percent and 93.3 percent, respectively) (Tr. 620-21, Ex. P-179).

Kimball Brace, an experienced analyst of voting behavior (Tr. 584-585, Ex. P-46), performed regression analyses of Norfolk city council elections between 1974 and 1982 and concluded that "there is severe and strong racial polarization and bloc voting in the City of Norfolk" (Tr. 638). A second expert, Dr. Richard Engstrom, who is a national authority on minority vote dilution, performed an independent statistical analysis of Norfolk voting and concluded that "voting in Norfolk is racially polarized. . . . Seriously polarized" (Tr. 920). Dr. Justin Green, defendant's main computer expert, admitted that the differences between Mr. Brace's regression results and his own were so small that he used Mr. Brace's figures in his analysis (Tr. 1892), and both of defendants' experts admitted that there was a high correlation between race and voting in Norfolk city council elections (Tr. 1871-72 [Dr. Green]; Tr. 2019-20 [Dr. Timothy O'Rourke]).

Plaintiffs established a history of official discrimination in Norfolk. Black voters had been effectively disenfranchised by the literacy test and poll tax provisions of the Virginia Constitution of 1902 (Va. Const. of 1902, Art. IX § 140), which remained in effect until the Voting Rights Act of 1965, and Norfolk long maintained a dual school system which provided inferior education for black students. When the city's high schools and junior high schools were desegregated by court order, the Norfolk City Council voted to close the integrated schools. *See James v. Ducksworth*, 170 F. Supp. 342 (E.D. Va.), *aff'd*, 267 F.2d 224 (4th Cir. 1959), *cert. denied*, 361 U.S. 835 (1959). As recently as 1981 and 1982, the United States Attorney General had objected under Section 5 of the Voting Rights Act to state legislative reapportionment plans for the Virginia House and Senate,

in part because of the dilution of black voting strength in Norfolk (Exs. P-27, P-28, and P-29). In 1982 the Justice Department objected to at-large voting in Norfolk's multi-member House district because it diluted black voting strength (Ex. P-29); the Norfolk City Council supported the efforts of the Norfolk house delegation to retain this discriminatory multi-member district (Ex. P-11, pp. 73-74; Ex. P-13, p. 80).

Plaintiffs presented evidence that blacks were excluded from a slating process controlled by an all-white "west-side business coalition" (Ex. P-11, pp. 9-21) which a witness for defendants claimed "has maintained a majority on council since I can remember . . ." (Tr. 1672). When asked why a black candidate was not considered by the westside business coalition when they were "looking for somebody to run" with a slate consisting of two whites in 1976, Norfolk's Mayor Vincent Thomas replied that including a black on the ticket "was just not a reasonable political possibility" (Ex. P-11, p.21).

Expert testimony was offered by the plaintiffs which indicated that electoral campaigns in Norfolk were characterized by both overt and subtle racial appeals. For instance, the question of school busing dominated the 1982 city council election and all three white incumbents appealed to white fears and backlash on this issue (Tr. 1134-35, 1183; Ex. P-12, pp. 67-69; Ex. P-40). Additionally, voting in the subsequent election, according to the expert testimony, was polarized along racial lines and corresponded to the candidates' positions on busing. (Ex. P-16, pp. 36-38, Ex. P-187).

Plaintiffs also sought to demonstrate that the election of a second black city council member in 1984 reflected an attempt to manipulate the electoral process so as to thwart their legal challenge to the at-large system. In the 1984 election, which took place after the filing of this lawsuit and immediately prior to trial, the westside business coalition made a decision to run only two candidates in

an election in which there were three open seats (Tr. 1672-73, Tr. 921); in a January 1984 newspaper interview Norfolk Mayor Thomas remarked: "After the election, the issue of black representation may become a moot point" (Ex. P-11, p.101).

Finally, plaintiffs also sought to show that Norfolk's large size in both population and land area, the election of council members for staggered terms, and the absence of any district or ward residency requirement, when seen in conjunction with pervasive racially polarized voting served to "enhance the opportunity for discrimination against the minority group" (S. Rep. at 29).

The District Court Opinion

Despite this evidence, the district court rejected plaintiffs' claim and ruled that the at-large voting system for electing the Norfolk City Council did not violate Section 2 of the Voting Rights Act. The district court either discounted or found against plaintiffs on each of the nine factors which Congress, in enacting the 1982 amendment, regarded as strong evidence to support a finding of a Section 2 violation. *See* S. Rep. at 27-29. For example, the trial judge held that the fact that in two recent elections the turnout rate of black voters had exceeded that of white voters offset the entire history of official discrimination in Norfolk. App. 33a.

The district court rejected plaintiffs' claim that Norfolk city council elections had been characterized by pervasive racially polarized voting by adopting a three-part definition of bloc voting proffered by defendants' expert Dr. Timothy G. O'Rourke. These factors are: "the presence or absence of 'white backlash,'" "the voting patterns of black and white voters over a period of years," and "whether whites attempt to limit the field of candidates." App. 35a-41a. Without reference to either the legislative history or any appellate court decision thus

defining racially polarized voting, the district court expressly embraced this definition because "it more effectively considers voters' *motivations* in selecting particular candidates" (*id.*) (emphasis added).

The district court also rejected plaintiff's evidence of an all-white slating process, basing its conclusion expressly upon a novel definition by Dr. O'Rourke of a slating group as "a permanent or semipermanent organization who [sic] recruits candidates to run for . . . as many seats as are open . . . as a slate." App. 44a. It also rejected plaintiffs' claims that elected officials in Norfolk were unresponsive to the needs of the black community by seeking to excuse historic underrepresentation of blacks in Norfolk governmental employment because other local entities' records were no better (App. 53a-54a) or because of recent recruiting efforts mandated by federal court decrees governing the police and fire departments (*id.*).

The district court rejected claims by plaintiffs that the Norfolk Redevelopment and Housing Authority (NRHA) had not been responsive to the needs of black residents, particularly in its relocation of 1800 black families from their neighborhood, because plaintiffs had failed to establish racial animus as the motivating factor. App. 58a-62a.[3]

Thus, the trial court minimized the significance of plaintiffs' proof either by holding it insufficient to meet an evidentiary burden not grounded in the statute, or by simply denying its existence. Having failed to credit

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[3] The district court also found no racial appeals in city council elections, App. 48a-50a, that there was "no evidence" that the election of a second black city council member after the filing of this lawsuit was an attempt to moot this case, *id.*, determined that Norfolk was "not an unusually large election district" App. 71a, and held that neither the staggered election terms nor the lack of a district residency requirement enhanced the opportunity for discrimination in Norfolk city council elections—despite Congress' recognition that both factors are evidence of a Voting Rights Act violation.

the plaintiffs with establishing *any* of the factors which Congress explicitly identified as substantial indications of discriminatory practices, the district court drew the conclusion that the "totality of the circumstances" failed to show a violation of Section 2 of the Voting Rights Act.

The Court of Appeals' Decision

On July 22, 1985, a divided Court of Appeals for the Fourth Circuit affirmed, Judge Butzner dissenting. App. 83a. The panel majority characterized the issues as "essentially factual" and, applying the standard of review governing findings of fact contained in Fed. R. Civ. P. Rule 52(a), found that plaintiffs had failed to meet their "heavy burden" of showing that the district court's rulings were "clearly erroneous":

> Looking at the facts, as established by the record as a whole and measuring the question presented by the "totality of the circumstances," we simply are not left with a firm conviction that an error has been committed by the district judge . . . [T]he question is . . . whether the district judge to whom the resolution of the factual disputes is finally allocated was clearly erroneous. We cannot say that he was. [App. 8a-9a.]

Because of this standard of review, many of the important legal issues raised by petitioners are not addressed in the majority's opinion. For example, petitioners contended that the district court erred as a matter of law in negating plaintiffs' extensive statistical proof of voting along racial lines in Norfolk council elections, and that the definition adopted by the district court is contrary to the legislative history of Section 2 and existing case law, including decisions of this Court. Yet this issue is not even discussed in the majority opinion.

The dissenting judge recognized that "[t]he principal issues the appellants raise address errors of law to which the clearly erroneous rule does not apply," that the mistakes of law "infected this entire proceeding," and

that "[g]iven the court's misperception . . . judgment against appellants was foreordained." App. 9a-15a (Butzner, J., dissenting).

Judge Butzner would have held that the requirement that plaintiffs in a Section 2 case show "white backlash" and "white attempts to limit the field of candidates," in order to prove racial polarization constituted an error of law "contrary to precedent," citing *Rogers v. Lodge*, 458 U.S. 613, 623 (1982), in which this Court "has recognized racially polarized voting exists when there is 'bloc voting along racial lines.'" App. 14a. Judge Butzner stated that the "additional elements the district court engrafted on the accepted definition of racially polarized voting require *proof of intention to abridge* the minority's voting rights," but because the 1982 Amendment to the Voting Rights Act "eliminated the necessity of proving a discriminatory purpose to establish a [Section 2] violation . . . [t]he district court's interpretation is contrary to the cardinal principle of the 1982 Amendment." App. 14a (emphasis added). (The dissenting judge also found that the district court made this same "error of law" in requiring plaintiffs to prove that the relocation of the approximately 1800 black families in East Ghent "was racially motivated." App. 15a).

Judge Butzner's opinion criticized the district court for "adopt[ing] without the citation of precedent, a restrictive definition of a 'slate,'" App. 14a, and declared that, "[c]ontrary to Supreme Court precedent, the district court held that staggered terms and the lack of residency requirements do not enhance the opportunity for discrimination against minorities." App. 15a. Finally, the dissent found "clearly erroneous" the district court's dismissal of the suspect events surrounding the election of a second black council member in 1984: "[t]he mayor's published statement was a subtle racial appeal, of the type which the Senate Report condemns, for implicitly it appealed to all who opposed the ward system, which was sought by

the NAACP, to vote for the mayor's black candidate." App. 17a.

REASONS FOR GRANTING THE WRIT

Introduction

As in *Thornburg v. Gingles*, No. 83-1968 (pending), this case presents important issues concerning the proper interpretation of the 1982 Amendments to Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973. Congress acted decisively in 1982 to alter the prior interpretation of Section 2 announced by this Court in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), in order to restore the broad proscription of discriminatory practices which earlier decisions of this Court and the Courts of Appeals had recognized. It is therefore of critical importance that the "new" Section 2 be properly interpreted and applied in order to effectuate the Congressional intent.

Affirmance of the district court's ruling by the court below brings the Fourth Circuit into conflict with the standards of law set forth by Congress in the 1982 Amendments, as well as with rulings of other Courts of Appeals interpreting amended Section 2. The trial court erroneously reintroduced into the Voting Rights Act an "intent" standard for proving several of the key factors which Congress identified as highly probative of a Section 2 violation—in direct contradiction to Congress' central purpose in the 1982 Amendments of removing any "intent" requirement. In addition, the district court disregarded or reformulated other key evidentiary factors despite Congress' explicit endorsement of their significance in the legislative history of the 1982 Amendments.

This petition presents the Court with only the second opportunity to guide the decisionmaking of trial and appellate courts under Section 2. The district court accepted and applied many of the same sorts of arguments for an improperly narrow interpretation of Section 2

which are advanced by Appellants in *Gingles*. But the Court of Appeals' majority declined to review those legal questions. Rather, it treated the case as one involving only factual disputes subject to the "clearly erroneous" standard of Fed. R. Civ. P. 52(a). This Court should, therefore, grant the petition in order to consider and correct the critical legal errors made by the district court in construing the 1982 Amendments to Section 2, as well as to clarify the standard of review.

This Court has a special responsibility, in light of its limited resources, to insure the availability of effective appellate review of trial court rulings on legal questions. Recently the Court has emphasized Rule 52's deferential standard of review of *factual determinations*; but it has correspondingly affirmed that the Courts of Appeals must independently examine trial court *rulings of law*, even those which necessarily channel the subsidiary fact-finding upon which a trial court's ultimate judgment may rest. The failure of the court below to review rigorously the legal standards for establishing a Section 2 violation which were applied by the trial judge, therefore, also warrants review because it presents a recurring question about the division of responsibility and authority between trial and appellate courts that demands the exercise of this Court's supervisory jurisdiction.

I. THE COURT OF APPEALS' FAILURE TO REVIEW DISTRICT COURT RULINGS OF LAW INTERPRETING THE FACTORS ESTABLISHING A VIOLATION OF SECTION 2 OF THE VOTING RIGHTS ACT WAS NEITHER REQUIRED NOR JUSTIFIED UNDER FED. R. CIV. P. 52 AND PRESENTS AN IMPORTANT ISSUE UPON WHICH GUIDANCE FROM THIS COURT IS REQUIRED.

In 1982, Congress amended the Voting Rights Act to provide a remedy for racial discrimination where the "totality of the circumstances" revealed that "the political processes leading to nomination or election in the state or

political subdivision are not equally open to participation by members" of a protected group, and that such "members have less opportunity than other members of the electorate to participate in the political processes and to elect representatives of their choice." 42 U.S.C. § 1973. The authoritative Senate Report on the 1982 Amendments identifies many of the criteria to be examined under this "results" test to determine whether there is true equality of political opportunity for the minority community. It adopts standards derived from this Court's decision in *White v. Regester*, 412 U.S. 755 (1973), and lower court rulings applying *White*, including *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976).

The district court departed from this statutory scheme through its recasting of several of the principal indicia of vote dilution recognized by the Congress, as by introducing an intent requirement to make out a showing of both racially polarized voting and the non-responsiveness of local officials to minority communities, or by sharply limiting the meaning of a "slating organization." That court also committed legal error when it gave no weight to factors which Congress considered important, either by holding they were outweighed by recent episodic occurrences (*e.g.*, voter turnout in last two elections negates history of discrimination) or simply by treating them as insignificant (staggered terms and lack of residency requirements). Petitioners sought to have these manifest errors corrected by the Court of Appeals, but the panel majority failed to review the fundamental errors claimed by petitioners in light of its characterization of the case as implicating only factual determinations subject to deferential review under Fed.R.Civ.P. 52(a).

Whether the majority thought that petitioners' claims were shielded from scrutiny because they guided the lower court's fact-finding, or whether it was applying Rule 52

to its review of legal as well as factual matters, it erred. Because the subsidiary fact-finding of trial courts in Section 2 cases is guided by well established judicial standards which Congress adopted, the failure of the court below to afford effective appellate review to petitioners necessarily raises substantial issues as to the proper construction of the statute which merit review, and some of which are presently being considered by this Court in *Thornburg v. Gingles.*

Review by this Court is also compelled because of the recurring need for clarification and guidance as to the Courts of Appeals' responsibility to afford effective appellate review. In recent years, the Court has acted to restrain the Courts of Appeals from trenching upon the trial judges' superior opportunities to make credibility and evidentiary determinations. *See Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *Anderson v. City of Bessemer*, 470 U.S. ——, 84 L.Ed. 2d 518 (1985). This case presents the other side of the coin—a situation in which the panel majority in effect delegated unreviewed discretion to the trial court to make legal judgments. Although it arises here in the context of a statutory "totality of the circumstances" standard, the issue is the same as that involving "mixed questions" of law and fact, as to which the lower courts remain divided and in need of further guidance.[4] The extent of the confusion over this

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[4] It is easy to state the general rule: the scope of appellate review turns on whether the trial court determination under consideration was factual or legal. Yet, as this Court has recognized, the fact-law distinction is often vexing. *Pullman-Standard*, 456 U.S. at 288; *see also Baumgartner v. United States*, 322 U.S. 665, 671 (1944).

Some prior cases seem to suggest that mixed questions are to be treated like findings of fact (*see, e.g., Commissioner v. Duberstein*, 363 U.S. 278 (1960)), while others appear to favor the thorough review given conclusions of law (*see, e.g., Baumgartner v. United States*). Unfortunately, this Court's decisions provide no litmus test to determine which "mixed questions" are to be treated which way. When the legal component of a mixed question

critical matter of appellate review is best exemplified by comparing the invocation of the clearly erroneous standard in the case at bar with the diametrically opposite conclusion reached by another panel of the Fourth Circuit in an opinion authored by the same judge, Judge Murnaghan:

> Of course, we are aware of the limits placed upon us as an appellate court reviewing a trial court decision. We may not overturn findings of fact unless they are "clearly erroneous." . . . In the case sub judice, however, we find a mistake in the rule of law, or perhaps, a mistake in the application of law to the facts. Characterized in either fashion, the situation permits us to correct the error in the district court.

Rawl v. United States, No. 84-2333 (4th Cir., December 4, 1985), slip op. at 10-11. In spite of this understanding in one context, the Court of Appeals in the present case failed even to address the issues of law raised by plaintiff-appellants.[5]

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is commonplace or ordinary, there is a tendency to apply the "clearly erroneous" standard. When the legal component is technical or uncertain, reviewing courts tend to be more exacting in their consideration. However, the distinction between principles that are common and those that are technical is no more "illuminating" or "self-executing" (to borrow *Duberstein's* terms) than is the distinction between fact and law. *See, e.g., Manning v. Trustees of Tufts College*, 613 F.2d 1200, 1203 (1st Cir. 1980) (applying "clearly erroneous" standard to mixed questions); *United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir. 1984), *cert. denied*, —— U.S. ——, 105 S. Ct. 101 (1984) (standard of review of mixed questions to be determined on case-by-case basis); *Karavos Compania Naviera, S.A. v. Atlantic Export Corp.*, 588 F.2d 1, 7-8 (2d Cir. 1978) (plenary review of mixed questions); *Stewart v. General Motors Corp.*, 542 F.2d 445, 449 (7th Cir. 1976) (same); *William B. Tanner WIOQ, Inc.*, 528 F.2d 262, 266 (3d Cir. 1975) (same); *Stafos v. Jarvos*, 477 F.2d 369, 372 (10th Cir.) (same), *cert. denied*, 414 U.S. 944 (1973).

[5] We recognize that the panel majority wrote that "(t)he issues raised, though sporting various guises, were essentially factual

The proper role of the Courts of Appeals is to afford effective review by making independent determinations of the correctness or error of legal determinations by trial courts, while exercising more deferential review of lower court factual findings:

> Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous . . . . The Rule does not apply to conclusions of law. The Court of Appeals, therefore, was quite right in saying that if a district court's findings rest on an erroneous view of the law, they may be set aside on that basis.

Pullman-Standard v. Swint, 456 U.S. at 287; *accord Anderson v. City of Bessemer*, 470 U.S. ——, 84 L.Ed. 2d 518, 529 (1985); *Bose v. Consumer's Union*, 466 U.S. 485, 498 (1984); *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 855 n.15 (1982).

It is as important for this Court to ensure that the Courts of Appeals carry out the first part of their responsibilities as it was for the Court to insure that they complied with the strictures of Fed. R .Civ. P. 52(a), *see Pullman-Standard v. Swint*. Review should be granted in this case for that purpose.

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and, in the end, amounted to the assertion that the district judge, in his findings, was clearly erroneous." App. 3a. As described in the succeeding portions of this Petition, the legal issues sought to be raised by Petitioners in the Court of Appeals were straightforward, not disguised, and they go to the very core of the Amendments to Section 2 which Congress enacted in 1982. As Judge Butzner correctly pointed out in his dissenting opinion, after following Justice Powell's admonition in *Anderson* to "engage in a comprehensive review of the entire record,"

> [T]he principal issues the appellants raised addressed *errors of law* to which the clearly erroneous rule does not apply . . . . Because these assignments of error are meritorious, I would vacate the judgment of the district court and remand the case for consideration of the evidence in accordance with correct legal standards. [App. 9a (emphasis added; citation omitted)].

II. WITHOUT INDEPENDENT LEGAL REVIEW, THE COURT OF APPEALS AFFIRMED THE DISTRICT COURT'S APPLICATION OF IMPROPER LEGAL STANDARDS WHICH CONFLICT WITH DECISIONS OF THIS COURT, OTHER COURTS OF APPEALS, AND THE LEGISLATIVE HISTORY OF SECTION 2.

The district court, in its pivotal construction of Section 2 leading to its judgment that plaintiffs proved none of the factors which Congress recognized would tend to establish a statutory violation, made fundamental legal mistakes of two kinds: First, it read an "intent" requirement into the law as to some of the factors. Second, it imposed heightened evidentiary burdens upon plaintiffs or applied incorrect legal standards as to other factors. These errors, if left uncorrected, threaten to undermine the Congressional purpose behind the 1982 Amendments to Section 2—at least in the Fourth Circuit—and require examination by this Court.

A. The Court of Appeals Affirmed Without Comment The Application Of An Intent Standard To The Critical Evidentiary Factor Of Racially Polarized Voting.

The legislative history of the 1982 Amendments makes unmistakably clear that Congress' principal objective was to provide a remedy for electoral schemes that deny minorities an equal opportunity to participate in the political process and elect representatives of their choice without requiring proof of discriminatory intent. S. Rep. at 15-16; *McMillan v. Escambia County (McMillan II)*, 748 F.2d 1037, 1041-42 (5th Cir. 1984). Congress stated that the intent standard asked the "wrong question," was "unnecessarily divisive," and imposed an "inordinately difficult burden of proof" upon plaintiffs. S. Rep. at 36-37.

In direct contravention of Congress' express purpose in amending the Act, the district court crafted an idiosyncratic definition of racially polarized voting which focused

primarily on discriminatory *intent*. Under this homespun definition of racial bloc voting, plaintiffs were required to prove the presence of "white backlash" and "white attempt[s] to limit the field of candidates." App. 35a-41a. The district court reasoned that this novel requirement "more effectively considers voters' motivations in selecting particular candidates." App. 36a. The statistical studies relied on by plaintiffs were found lacking because "in no way can they be said to reflect the rationale behind an individual's selection of a particular candidate." *Id.*[6]

The legislative history of the 1982 Amendments to Section 2 and subsequent case law note the importance of proof of racially polarized voting to a vote dilution claim. S. Rep. at 33; *United States v. Marengo County Commission*, 731 F.2d 1546, 1566-67 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 375 (1984); *Jones v. City of Lubbock*, 727 F.2d 364, 385 (5th Cir. 1984). Racially polarized voting has been defined by this Court simply as "[v]oting along racial lines . . ." *Rogers v. Lodge*, 458 U.S. at 623; cf. *United Jewish Organizations v. Carey*, 430 U.S. 144, 166 n.24 (1977).

The proper legal standards governing proof of racially polarized voting are clear. In the cases decided both under the new Section 2 standard and under the *White v. Regester* standard—which were intended by Congress to

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[6] Under the majority's opinion, the combined reintroduction of intent into the Voting Rights Act and the radical redefinition of racially polarized voting were left unreviewed. As the dissent noted:

> The additional elements the district court engrafted on the accepted definition of racially polarized voting required proof of intention to abridge the minority's voting rights . . . . But in enacting the 1982 amendments to the Voting Rights Act, Congress eliminated the necessity of proving a discriminatory purpose to establish a violation of the Act . . . . The district court's interpretation is contrary to the cardinal principal of the 1982 amendment. (App. 14a.)

govern Section 2 adjudication (S.Rep. at p.23 nn.78, 82, pp. 27-30)—racially polarized voting has been proven by statistical and other proof showing a high degree of association between the racial composition of the voting precincts and the race of the candidates.[7]

None of these cases, nor any of the 14 cases to reach this Court involving proof of racially polarized voting,[8] have required proof of "white backlash" or "white attempts to limit the field of candidates" as necessary or required to show racially polarized voting. The relevant portion of the sole case relied upon by the district court in support of its idiosyncratic definition, *United States v. Dallas County Commission*, 538 F.Supp. 994-05 (S.D.

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[7] *See, e.g.*, Section 2 cases: *McMillan v. Escambia County, supra*, 748 F.2d at 1043; *Marengo County, supra*, 731 F.2d at 1567; *Jones v. City of Lubbock, supra*, 727 F.2d at 380-81; *Major v. Treen*, 574 F.Supp. 325, 337-39 (E.D. La. 1983) (three-judge court); *White v. Regester* cases: *Nevett v. Sides*, 571 F.2d 209, 223 n.16 (5th Cir. 1978), *cert. denied*, 446 U.S. 951 (1980); *Parnell v. Rapides Parish School Bd.*, 425 F.Supp. 399, 405 (E.D. La. 1976), *aff'd*, 563 F.2d 180 (5th Cir. 1978), *cert. denied*, 438 U.S. 915 (1978); *Graves v. Barnes*, 343 F.Supp. 704, 731 (W.D. Tex. 1972) (three-judge court), *aff'd sub nom. White v. Regester, supra*.

[8] *See Mississippi Republican Executive Committee v. Brooks*, —— U.S. ——, 105 S.Ct. 416 (1984), *aff'g, Jordan v. Winter*, 604 F.Supp. 807 (N.D. Miss. 1984) (three-judge court) (summary affirmance of district court use of statistical correlations); *City of Lockhart v. United States*, 460 U.S. 125 (1983); *Perkins v. City of West Helena*, 675 F.2d 201, 213 (8th Cir. 1982), *aff'd mem.*, 459 U.S. 801 (1982); *City of Port Arthur v. United States*, 459 U.S. 159 (1982); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Hathorn v. Lovorn*, 457 U.S. 255 (1982); *City of Mobile v. Bolden*, 446 U.S. 55 (1980); *City of Rome v. United States*, 472 F.Supp. 221, 226 (D.D.C. 1979), *aff'd*, 446 U.S. 156 (1980); *United States v. Mississippi* and *Henry v. Mississippi*, 444 U.S. 1050 (1980); *United Jewish Organizations v. Carey*, 430 U.S. 144, 166 (1977); *Beer v. U.S.*, 425 U.S. 130 (1976); *City of Richmond v. U.S.*, 422 U.S. 358 (1975); *City of Petersburg v. U.S.*, 354 F.Supp. 1021, 1026 n.10 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973); *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *Wood v. Georgia*, 370 U.S. 375 (1962).

Ala. 1982), subsequently was reversed by the Eleventh Circuit in a decision which finds racially polarized voting without requiring proof of the additional elements relied upon by the district court. 739 F.2d 1529, 1535-36 (11th Cir. 1984).[9]

Under proper legal standards, the record reveals clear statistical evidence of racially polarized voting. *See supra* pp. 3-4. Thus, the unreviewed errors of law have a critical and immediate impact upon the substantive outcome of this case.

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[9] The scope of the *legal*, not *factual* problem is revealed by the district court's comments during the trial, when it said that the presentation of testimony on voting patterns was a waste of time (Tr. 606), "beating the obvious" (Tr. 631), "overkill" (Tr. 1231), and "absolutely obvious" (Tr. 1232). The Court further stated: "I don't think that Mr. Chappell or Mr. Juren or any of these folks on the city side deny that black precincts by and large support—overwhelmingly support black candidates or that white precincts by and large generally support white candidates . . ." (Tr. 606). Even respondents admitted below that, "the problem, however, was not so much with the appellants' statistics, as with the interpretation of those numbers." Brief for Appellees at 32.

The evidence and testimony at trial established that white city council members were able to get elected with "virtually no black vote" (Tr. 916-918), while blacks "have never elected any candidate without some white support and therefore are very much beholden to the white community." (Testimony of K. Brace, Tr. 640). Such racially polarized voting patterns allow white elected officials to gain office without concern for black interests, while black elected officials "don't always reflect totally the black electorate." *Id.* For example, Rev. Joseph N. Green was elected in 1982 with approximately 30 percent of the white vote, but Mrs. Evelyn Butts, whom defendants' witness Del. William P. Robinson, Jr. termed "a good candidate" (Tr. 1676), received a full 100 percent of the black vote in the 1980 city counsel election and 93.1 percent of the black vote in the 1982 election yet lost both times (Tr. 636, Ex. P-184). In explaining the outcome of the 1982 city council election, white city councilman Summers explained: "People feared Evelyn Butts, that's why they came out and worked. Nobody fears Joe Green" (Ex. P-52, Ex. P-13, p. 66). Cf. *Rogers v. Lodge*, 458 U.S. 613, 623 (1982) (racial bloc voting "allows those elected to ignore black interests without fear of political consequences").

B. The Court of Appeals Also Affirmed, Without Review, The Use Of An Intent Standard To Evaluate Whether The Norfolk City Government Was Unresponsive To the Needs Of The Black Community.

Parallel to its ruling on racially polarized voting, the district court imposed a requirement of proof of discriminatory intent underlying the lack of responsiveness by white elected officials. *See* App. 60a-61a (housing authority's unresponsiveness held insignificant because "not racially motivated").[10] The dissent by Judge Butzner termed this "a semantic disguise for 'discriminatory purpose' ". App. 15a. *See also Kirksey v. Board of Supervisors of Hinds County*, 554 F.2d 139, 149 n. 18 (5th Cir. 1977) (*en banc*), *cert. denied* 434 U.S. 968 (1977) (district court erred by requiring proof of willful unresponsiveness).

C. The Court of Appeals Affirmed the District Court's Imposition Of Heightened Proof Requirements Not Grounded in the Statute and the Misdefinition of Other Evidentiary Standards.

The district court required plaintiffs to meet enhanced evidentiary burdens to establish several of the factors expressly declared probative of Section 2 violations by Congress in the Senate Report on the 1982 Amendments to the Voting Rights Act, in direct contravention of the

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[10] This issue arose most graphically in connection with the City's decision to relocate black low-income families to make way for a white middle-income redevelopment project. Although the district court acknowledged an initial commitment by the city Housing Authority to include some subsidized housing to permit relocated black families to return to East Ghent, that commitment was not fulfilled. The district court refused to find evidence of unresponsiveness since it decided that the decision of the housing authority "was not racially motivated, but rather was motivated by a genuine desire to broaden the city's downtown tax base" App. 61a.

standards set forth in the legislative history of the Amendments.

1. *Slating Process.*

The existence of a white-controlled slating process, according to Congress, constitutes a significant impediment to equal minority participation. S. Rep. at 29. At trial, plaintiffs presented considerable evidence and testimony to support their claim that an all-white "westside businessman's coalition" existed which slated and promoted white candidates only. The district "court [found] that this group does not constitute a slating organization *as defined by Dr. O'Rourke*," App. 44a (emphasis added) and gave this factor no weight in determining whether the "totality of the circumstances" indicated discrimination. Neither the legislative history, nor the pre-1982 case law which it adopts, *see White v. Regester*, 412 U.S. at 767, employs Dr. O'Rourke's definition, however. As the dissent below noted:

> [T]he district court adopted, without the citation of precedent, a restrictive definition of a "slate." The court required the appellants to prove a "permanent or semipermanent organization" which solicits candidates to run for office and puts them up "for as many seat as are open." The legislative history offers no support for this definition . . . . Significantly, courts that have discussed slates or a slating process have not imposed the burdensome requirements initiated by the district court. *See White v. Regester*, 412 U.S. 755, 766-67 (1973); *McIntosh County NAACP v. Darien*, 605 F.2d 753, 758 (5th Cir. 1979). [App. 14a-15a.]

Utilizing the more narrow definition offered by respondents' witness caused the district court to disregard uncontradicted evidence that both current Mayor Vincent Thomas and another white politician were recruited in 1976 by a group of westside white business-

men to serve on a "slate" which they would sponsor and for which they would not consider a black candidate. The district court held that "[a] slate, as defined by Dr. O'Rourke, consists of as many candidates as there are seats available. Accordingly, the Thomas-Phillips ticket could not constitute a slate." 44a-45a.[11] There is nothing in the 1982 Amendments to Section 2, their legislative history or the *White v. Regester* progeny which supports the heightened evidentiary burden which the district court imposed upon the plaintiffs, and based upon which it held that plaintiffs had failed to establish one of the factors Congress declared to be indicative of a Section 2 violation.

2. *History of Official Discrimination.*

The district court correctly found that there had been an extensive past history of official discrimination in Virginia affecting the rights of black Virginians to register and vote (App. 32a-35a). But the court of appeals erred as a matter of law in failing to review according to proper legal standards the district court's conclusions that recent increases in black registration and turnout negated Virginia's past history of discrimination and that "there are no lingering effects of that discrimination which prevent Norfolk's black citizens from participating in the electoral process today" (App. 70a).

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[11] The district court's finding that there was "no evidence, other than the testimony of plaintiffs themselves, that this 'westside businessmen's coalition' is a slating organization," App. 44a, is a clearly erroneous finding of fact. Del. Robinson, a witness for defendants, testified that the all-white westside business coalition "has maintained a majority on council since I can remember . . ." (Tr. 1672). Mayor Thomas testified that he was first recruited to run for city council by this coalition, and that no consideration was given to including a black incumbent on the ticket (Ex. P-11, pp. 9-21). Mayor Thomas testified that "[w]e wanted to have as many things in our favor to get elected as possible" and that including a black on the ticket "was just not a reasonable political possibility" (*id.* at p. 20).

The proof at trial showed continued underrepresentation of blacks on the Norfolk City Council, continued voting along racial lines in the city council elections, continued depressed socioeconomic circumstances for Norfolk blacks, and continued segregated residential patterns, all of which have been held by courts of appeals in other cases to show that the effects of past discrimination continue to persist and directly affect electoral participation by the black minority. *Dallas County Commission*, 739 F.2d at 1537; *Marengo County Commission*, 731 F.2d at 1568; *Jones v. City of Lubbock*, 727 F.2d at 383; *Washington v. Finlay*, 664 F.2d 913, 921 (4th Cir. 1981). Recent court of appeals decisions in other Section 2 cases also have ruled that the absence of significant disparities between white and black voter registration does not negate a finding that "the present political system nevertheless preserves a past lack of access." *Jones v. City of Lubbock*, 727 F.2d at 385; *McMillan*, 748 F.2d at 1045.

3. *Discriminatory Electoral Mechanisms.*

The court of appeals also erred as a matter of law in affirming the district court's conclusions that Norfolk's large size, both in population and land area, the staggered terms rule, and the lack of a district residency requirement do not enhance the opportunity for discrimination in city council elections (App. 71a-72a). This conclusion is contrary to controlling decisions of this Court, *City of Rome v. United States*, 446 U.S. 156, 185 (1980) (staggered terms); *Rogers v. Lodge*, 458 U.S. at 627 (large size of at-large election district; with no residency requirement "[a]ll candidates could reside in . . . "lilly-white' neighborhoods. To that extent, the denial of access becomes enhanced."); *White v. Regester*, 412 U.S. at 766 n. 10 (lack of subdistrict residency requirement); also, *Jones v. City of Lubbock*, 727 F.2d at 383 (staggered terms), and contrary to the legislative history of Section 2 which cites these mechanisms as fac-

tors proving a Section 2 violation, S.Rep. at 29 (large election districts), 143-44 (staggered terms); H.R. Rep. No. 227, 97th Cong., 1st Sess. 18 (1981) (staggered terms). Failure to recognize the rulings of this Court and the findings of Congress that these devices do enhance discrimination in an at-large election system constitutes plain legal error and conflicts with controlling decisions of this Court and other courts of appeals. *See Dallas County*, 739 F.2d at 1535.[12]

4. *Lingering Socioeconomic Effects of Past Discrimination.*

In enacting the 1982 amendment to Section 2, Congress indicated that proof of continued socioeconomic disparities between whites and minorities is an important factor in establishing a Section 2 violation. S.Rep. at 29; *see White v. Regester*, 412 U.S. at 768. The district court found that blacks in Norfolk continue to be disadvantaged in education, income, employment and other areas (App. 46a-47a), but negated this factor because of recent increases in black registration and turnout (App. 69a-70a). The court of appeals erred in affirming this conclusion without independent review according to proper Section 2 legal standards. Under Section 2, socioeconomic disparities show a denial of equal access to the political process without any need to prove a causal

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[12] The proof also showed that each of these devices has a discriminatory impact upon Norfolk City Council elections. Norfolk's large size makes campaigning more difficult for black candidates, who have fewer financial resources than whites (Ex. P-41, Exs. D-70 to 91, Tr. 47-48); defendants' own expert admitted that the staggered terms rule reduces the effectiveness of black voting (Tr. 2088-89) and increases the minimum percentage needed to win, resulting in the defeat of black candidates (Tr. 2093-96; Ex. P-238, Ex. D-470); and because there is no district residency requirement, at the time of trial six of the seven council members came from predominantly-white neighborhoods, five from a small, upper-class, almost all-white westside enclave (Tr. 600-01; Ex. P-48).

nexus between socioeconomic status and black political participation. S.Rep. at 29 n.144; *Dallas County*, 739 F.2d at 1537; *Marengo County*, 731 F.2d at 1567-68.

III. THE COURT OF APPEALS FAILED TO CARRY OUT ITS PROPER RESPONSIBILITIES UNDER FED. R. CIV. P. 52(a) WHEN IT ALLOWED TO STAND A DISTRICT COURT RULING THAT THERE WAS "NO EVIDENCE" SUPPORTING THE CLAIM THAT THE EVE-OF-TRIAL ELECTION OF A SECOND BLACK TO THE NORFOLK CITY COUNCIL RESULTED FROM MANIPULATION OF THE ELECTORAL PROCESS IN AN ATTEMPT TO MOOT THIS LAWSUIT.

While Fed. R. Civ. P. 52(a) commands the Courts of Appeals to show proper deference to the factual findings of trial judges, it commands them equally to reverse judgments when the reviewing court is satisfied they are "clearly erroneous," that is, when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed," *United States v. United States Gypsum Company*, 333 U.S. 364, 395 (1948). In this case, the district court held that there was "no evidence" that after the filing of this lawsuit, the political process in Norfolk was manipulated to bring about the election of a second black member of the city council in an effort to moot the litigation. App. 51a. The record, however, demonstrates the contrary.

For example, one of the witnesses called by defendants (respondents in this Court) testified that the 1984 city council election in Norfolk was "unique" (Tr. 1672). After the filing of this lawsuit, the leaders of the principal all-white slating group in the city decided not to run a candidate for each of the three city council seats to be filled in the 1984 elections, but to run candidates only for two seats (Tr. 1672-73, 921-22). In the same campaign, Mayor Vincent Thomas, for the first time ever, supported a black candidate who would, if elected, become the second

minority-race council member.[13] Thomas was quoted in a contemporaneous newspaper article—which he confirmed at trial—as saying that "After the election, the issue of black representation may become a moot point" (Ex. P-11, p.101).

The district court made no findings that this testimony and documentary evidence was either not credible or not probative. It was therefore clearly in error in stating that there was "no evidence" to support the plaintiffs' charges, and the Court of Appeals failed to carry out its responsibility to reverse the judgment because of that clearly erroneous fact-finding.

As important as it may be to grant review in order to insure fulfillment of the Court of Appeals' duties under Rule 52, however, it is even more important that this issue be reviewed for the future correct interpretation of Section 2 of the Voting Rights Act. In 1982 Congress specifically warned against finding a minority candidate's recent success at the polls to be "conclusive of a minority

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[13] The sudden turnaround of Mayor Thomas contrasted sharply with his customary penchant for racial campaign appeals, as noted by the dissent. App. 16a-17a. Thus for example, one week before the 1982 elections, Mayor Thomas commented that,

> a failure to curb busing could destroy the political balance of power between blacks and whites in the city.
>
> It's not going to be any advantage to blacks and whites to have our traditional racial makeup altered . . . what does it help the city to change it. (Ex. P-40, Ex. P-11, pp. 53-70).

These comments by Mayor Thomas followed previous published comments by the white candidates for the 1982 city council election that busing would "bring the school system to its knees' and lead to a "breakdown in discipline," "premature retirements of principals and teachers," and "disproportionate numbers of blacks" (Ex. P-40, Ex. P-13, pp. 42-44, Ex. P-14, pp. 41-43). Evidence at trial proved the existence of ongoing subtle and overt racial appeals in opposition to measures overwhelmingly supported by the black community, particularly the issue of public school busing in the 1982 Norfolk City Council election. (Tr. 1183, Ex. P-12, pp. 67-69).

group's access to the political process, [because] we would merely be inviting attempts to circumvent the Constitution." S. Rep. at 29 n.115. In one of the two most important cases pointed to by Congress in the 1982 Amendments' legislative history, the court specifically cautioned that occasional success by minority candidates "might be attributable to political support motivated by different considerations—namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds." *Zimmer v. McKeithen*, 485 F.2d at 1307.

IV. THE PROPER LEGAL REMEDY OF DISTRICT ELECTIONS WAS ERRONEOUSLY EQUATED WITH PROPORTIONAL REPRESENTATION AND DENIED PLAINTIFFS AN INDEPENDENT ASSESSMENT WHETHER THE AT-LARGE SYSTEM WAS A VIOLATION OF SECTION 2 OF THE VOTING RIGHTS ACT.

During the trial and in its opinion, the District Court repeatedly interjected its concern with proposed remedies into the determination whether a violation of the Act existed.[14] This improper intermingling of remedial and violation-oriented concerns was a by-product of the district court's incorrect interpretation of the Section 2 proviso: "Provided, that nothing in this section establishes a right to have members of a protected class elected in

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[14] Among the trial judge's repeated references to possible remedies are: his assertion that any ward system ordered into effect would equal a quota system ("So your design, I take it, then is to see that the blacks get a certain quota of people on city council?") (Tr. 821), that ward lines would involve segregated voting ("When you segregate them aren't you creating more problems than you're doing good?") (Tr. 823), and that a ward system would be a "color stockade" (Tr. 824) in which the black vote "will be cooped up in the minority of the wards of the city" (Tr. 825). For even more extensive quotations of the District Judge's repeated interjecting of inappropriate remedial issues see App. 10a-11a (Butzner, J., dissenting).

numbers equal to their proportion in the population." 42 U.S.C. § 1973.

Contrary to the district court's equation of any ward system in which some wards would have a majority of black votes with "proportional political representation," the replacement of an at-large system with a ward system is a time-proven permissible remedy for vote dilution. *See Rogers*, 458 U.S. at 616; *City of Richmond v. United States*, 422 U.S. 358 (1975).[15]

As the dissent stated, "Given the court's misperception of the proviso, judgment against the appellants was foreordained." App. 12a. The district court's equation of remedies removing at-large elections with "proportional representation" parallels the arguments advanced in *Thornburg v. Gingles* and requires clear guidance from this Court.

CONCLUSION

The record in this case demonstrates that blacks in Norfolk have organized behind candidates, have registered to vote, and have faithfully participated in the political process. Neverthcless, the history of electoral outcomes shows that strong candidates marshalling the unified support of the entire black community have been thwarted in their bids for elected office. Given the strong polariza-

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[15] The dissent correctly observed:

> It is wrong to remedy an illegal at-large system by substituting a proportional representation system; but it is not wrong to substitute a fairly drawn ward system even though some wards will have a majority of black voters. On more than one occasion the Supreme Court has approved conversion of a discriminatory at-large system to a ward system. The ward system must be fairly drawn, but if this condition is met, it is no impediment that some wards have predominantly black residents and others have predominantly white residents . . . . [I]n *Rogers v. Lodge*, the Court observed that a minority may be unable to elect representatives in an at-large system, but it may be able to elect several representativse if single-membr districts are established. [Citations omitted.] App. 12a.

tion of voting patterns along racial lines and the presence of racial appeals in campaigns, the consistent electoral defeat of the chosen candidates of over one-third of the electorate to secure meaningful representation on a seven-member city council must be attributed to the structural impediment created by Norfolk's at-large election system. Because of the errors described above, the federal courts have failed to afford petitioners the relief to which they are entitled.

For the foregoing reasons, petitioners respectfully pray that the writ herein be granted and the case be set down for plenary consideration by this Court, or alternatively, that this Petition be held pending announcement of this Court's ruling in *Thornburg v. Gingles*, thereafter granted and the judgment vacated and cause remanded for consideration by the Court of Appeals in light of that decision.

Respectfully submitted,

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